IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-325

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ROBERT KELLY,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Petitioner, Robert Kelly, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 21, 1978.

## OPINION BELOW

On October 14, 1977, Petitioner, Robert Kelly, was indicted by a Grand Jury in Hartford charging him with violation of Title 18, United States Code, §371 Count 1 violation of 18 United States Code §1708 Count 3 in violation of Title 18 United States Code §495 Count 4. On October 21, 1977, he entered a plea of not guilty to these counts.

Trial to a jury of twelve began on January 4, 1978 and concluded on January 5, 1978, when a motion for a mistrial by the defendant was granted. On January 4, 1978, the defendant moved for a judgment of acquittal which was denied. On January 5, 1978, the defendant moved to dismiss which was denied. On January 10, 1978, the defendant moved for acquittal and to dismiss which was denied.

The defendant appealed to the United States Court of Appeals for the Second Circuit. On July 21, 1978, the United States Court of Appeals dismissed the appeal.

## JURISDICTION

This Court's jurisdiction is invoked under 28 United States Code, § 1254 (1).

## QUESTIONS PRESENTED

Whether the trial court erred in denying the defendant's motion for a judgment of acquittal as to Counts 3 and 4 of the indictment because of the government's failure to present evidence as to essential elements of these counts and whether a retrial of these counts would subject the defendant to double jeopardy.

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the Constitution.

## STATEMENT OF THE CASE

Gerald Lee Pierce, an undicted co-conspirator, was the Government's main witness. Mr.



Pierce testified that he could not identify the Government's Exhibit No. 1 which was the check made payable to the order of Esther Berman, referred to in Counts 3 and 4 of the indictment. Said check had been deposited in the checking account of K-C Foods Inc. and was initialed by the defendant, Robert Kelly. Pierce testified that said check was given to him by George Hufault, the co-defendant, on January 3 or 4, 1977. Pierce forged the signature of Esther Berman on the check and went to the delicatessen operated by K-C Foods, Inc. with Peter and Marilyn Baker. Pierce waited at a booth while Peter and Marilyn Baker went to the back office with the defendant, Robert Kelly, who was a co-owner of K-C Foods, Inc. When Mr. and Mrs. Baker returned, they had the full value of the check. They gave one-half to Pierce who then later gave one-half of his share to the co-defendant Hufault.

Pierce further testified that in mid January or February he talked to Kelly and reached an agreement with him to cash checks for one-half of their face value. He further testified that the Bakers were supplying drugs to Kelly as he was and that was the motive for cashing checks.

Pierce testified that he could identify Government's Exhibit No. 2 which was another check he stole from a mail box and cashed with the defendant Kelly for one-half of the face value of the check. He identified Government's Exhibit No. 3 as the check that he stole from a mail box and cashed with the defendant Kelly for one-half of the face value of the check.

On the second day of trial after the Government had completed its case, defense counsel was given for the first time a copy of a case report in

which Peter Baker had stated to a Government investigator that he went to the delicatessen with Pierce on several occasions but it was Pierce who would go into the back room to cash checks. In his Grant Jury testimony, Pierce had said he didn't recall whether he cashed the Berman check directly or through the Bakers. The U.S. Attorney stated that he had no knowledge that Pierce was directly involved with the Bakers until the day of trial. On motion by defense counsel, the Court granted a mistrial because of the government's failure to disclose the statement.

## REASONS FOR GRANTING THE WRIT ARGUMENT

The trial court erred in denying the defendant's motion for judgment of acquittal as to counts 3 and 4 of the indictment and a retrial would subject the defendant to double jeopardy.

The defendant is charged in Count 3 of the indictment with violation of Title 18, United States Code, §1708 by possessing a check payable to the order of Esther Berman that had been stolen from the mail, knowing the check had been stolen. In Count 4 the defendant was charged with uttering said check which had a forged endorsement, knowing said endorsement was forged in violation of Title 18, United States Code, §495.

The defendant, at the completion of the Government's case, moved for a judgment of acquittal as to these two counts. The motion was denied.

An essential element for the government to prove in both Counts 3 and 4 is that of knowledge by the defendant. The jury must find beyond a reasonable doubt that the defendant knew that the check



was stolen and that the defendant knew the check was forged in order to convict him of both Counts 3 and 4.

The courts have held that knowledge that a check is forged may be presumed from circumstantial evidence and that "the unexplained possession of a forged instrument by one who endeavors to obtain money thereon is prima facie evidence that such person forged the instrument." United States vs. Douglas, 313 F.Supp. 118 (1970), p. 119.

The Supreme Court has held that knowledge that an item was stolen could be inferred from the unexplained possession of a recently stolen property. "The evidence established that the petitioner possessed recently stolen treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of that inference alone common sense and experience tells us that the petitioner must have known or been aware of the high probability that the checks were stolen. Cf. Turner vs. United States, 396 U.S. at 417, 24 LEd 2d 610, Leary vs. United States, 395 U.S. at 46, 23 LEd 57. Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that the petitioner knew the checks were stolen. Since the inference thus satisfies the reasonable doubt standard, the most stringent standard the court has applied in judging permissive criminal law inferences we conclude that it satisfies the requirement of due process". United States vs. Barnes, 412 U.S. 837, 846, 37 LEd 2d 380, 97 S.Ct. 2357.

It is clear that the Government could prove knowledge as required under Counts 3 and 4 by showing sufficient evidence to raise the inference

that the defendant had knowledge that the check was forged and stolen. The defendant moved for a judgment of acquittal claiming that the Government had not produced said evidence. In passing on a motion for a judgment of acquittal, the courts have held that the trial court must view the evidence in a light most favorable to the Government. Only no evidence upon which a reasonable mind might prove built beyond a reasonable doubt would justify the granting of a judgment of acquittal. United States vs. Davis, 562 Fed. 2d 681, United States vs. French, 182 U.S. Appellate D.C. 325, 333 470 F.2d 1234, 1242 Cert. denied 410 U.S. 909, 93 S.Ct. 964, 35 LEd 2d 271, 1973. In applying the standard no legal distinction is made between circumstantial and direct evidence. Holland vs. United States, 348 U.S. 121, 139-40, 75 S.Ct. 20, 127, 99 LEd 150 (1954). The court must however consider only the evidence as it was when the Government rested. Powell vs. United States, 137, U.S. Appellate Div. D.C. 254, 257 N. 9, 14 F.2d 470, 473 N.9 (1969), United States vs. Davis, 562 F.2d 681, (1977).

A review of the evidence presented by the Government, however, reveals that there was no basis upon which one could presume the defendant had knowledge that the check was stolen or forged. The Government did not merely present evidence that the defendant had possession of the check. Instead the Government presented evidence as to how the defendant came into possession of the check. The evidence they produced indicated that the defendant was a part owner of the delicatessen. The co-conspirator Pierce obtained the check and forged it and then brought it to the defendant's place of business with the Bakers. The Bakers went in the back room with the defendant Kelly and they returned with the full face value of the check.



Pierce testified that he had conversations at a later date about selling stolen checks to Kelly for one-half their face value. While there was some vague testimony by Pierce that the Bakers were supplying Kelly with drugs, there was no testimony about any transaction concerning drugs when this particular check was given to Kelly. In fact there is no direct testimony that the check was actually given to Kelly on the night in question since Pierce did not view directly any transaction. If Pierce's testimony is believed in its entirety it shows no evidence from which one could infer that the defendant Kelly knew that the checks were forged or stolen. If anything, one would infer from the fact that he paid full face value of the check that he had no knowledge of the fact that it was stolen or forged. Thus there is no way in which a jury could find beyond a reasonable doubt that Kelly had knowledge that the check was stolen or forged.

Without knowledge that the check was stolen or forged, Kelly could not be convicted under Counts 3 and 4 of the indictment since knowledge was a necessary element of both counts. The court thus clearly should have entered a judgment of acquittal as to those two counts.

Since the court should have entered a judgment of acquittal, a retrial of the defendant as to these two counts would place him in double jeopardy. The Supreme Court has said

> "even if the first trial is not completed, a second prosecution may be grossly unfair and increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by unresolved accusations or wrongdoing and

> may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule the Prosecutor is entitled to one and only one opportunity to require an accused to stand trial." Arizona vs. George Washington, Jr., 98 S.Ct. 824, 46 Law Week 4129.

The court, in holding the defendant may be retried if he requests a mistrial, has said "but it is evident that when judicial or prosecutorial errors seriously prejudice the defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and if a reversal is secured, by a second prosecution. In such circumstances a defendant's mistrial request has objectives not unlike the interest served by the Double Jeopardy Clause -- the avoidance of the anxiety, expense and delay occasioned by multiple prosecutions." United States vs. Dinitz, 424 U.S. 600, 98 S.Ct. 1075, 47 LEd 2d 267 (1976).

The defendant in this case is being tried for three different counts. The court declared a mistrial after an error of the U.S. Attorney and upon the request of the defendant. The defendant's request for a mistrial however, should not allow the U.S. Attorney to have another opportunity to see if he can develop a better case against the defendant as to Counts 3 and 4. The double jeopardy clause was



intended to avoid the anxiety, expense and delay occasioned by multiple prosecutions. In an indictment with multiple counts where the Government has rested its case but failed to prove its case as to two counts, the Government should not be allowed to retry the defendant on those two counts. Therefore, the lower court should be instructed to enter a judgment of acquittal against the defendant as to Counts 3 and 4.

## CONCLUSION

For the foregoing reason, the Petitioner submits that the court erred in not dismissing Counts 3 and 4 of the indictment and in not finding that a retrial would subject the Petitioner to double jeopardy. Therefore, the judgment should be reversed.

Respectfully submitted,

Robert Farr
547 Burnside Avenue
East Hartford, Ct. 06108

Attorney for Petitioner

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OCTOBER TERM 1978

No.

ROBERT KELLY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-first day of JULY one thousand nine hundred and seventy-eight.

PRESENT:

HON. THOMAS J. MESKILL,
U.S. Circuit Judge
HON. EDWARD DUMBAULD,
U.S. District Judge*
HON. EDMUND PORT,
U.S. District Judge**

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UNITED STATES OF AMERICA

Appellee,

V.

ROBERT KELLY and
GEORGE HUFAULT,

Defendants-Appellants.

#78-1041
#78-1044

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* Hon. Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.

** Hon. Edmund Port, Senior District Judge of the Northern District of New York, sitting by designation.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

The parties are in agreement that the appellants' motions for a mistrial bars their plea of double jeopardy in the absence of a claim that the prosecutor acted in bad faith to provoke a mistrial. United States v. Scott, 46 U.S.L.W. 4632 (U.S. June 14, 1978); United States v. Dinitz, 424 U.S. 600 (1976); United States vs. Jorn, 400 U.S. 470 (1971). The prosecutorial error that occurred here consisted of the prosecutor's failure to make required disclosures prior to trial. In view of the time of the error, it is plain that the prosecutor was not motivated by a desire to avoid an acquittal in a case that was going badly and to obtain a second more favorable opportunity to convict. The nature of the error, considered in the light of the prosecutor's explanation of it, was such as to suggest poor judgment, not bad faith.

There was sufficient evidence of appellant Kelly's knowledge of the stolen nature of the Berman check to warrant denial of his motion for a judgment of acquittal on counts 3 and 4. Pierce testified that he had an agreement with Kelly pursuant to which Kelly would cash checks for Pierce for one half their face value. Pierce also testified to personal knowledge of an arrangement between Kelly and the Bakers pursuant to which Kelly would cash checks for their full value and the Bakers would supply Kelly with amphetamines. With regard to the Berman check, Pierce testified that he



gave it to the Bakers and the Bakers cashed it with Kelly. He testified that he received one half of the face value of the check, and he said that, to the best of his knowledge, Kelly paid full value for the check because of his arrangement with the Bakers. Although this testimony is inconclusive regarding whether Kelly paid full value under his arrangement with the Bakers or whether he paid half value under his arrangement with Pierce, in either case the jury could have concluded that Kelly knew the checks were stolen. Under the arrangement with Pierce, Kelly received half the value of the check, and under the arrangement with the Bakers, he received drugs. Because such benefits do not ordinarily accrue to those who cash checks honestly, the jury could properly infer that Kelly either knew the checks were stolen or deliberately closed his eyes to the truth. This inference is bolstered by the fact that Kelly knew he was cashing the check for individuals none of whom was the payee of the check.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Hon. Thomas J. Meskill, U.S.C.J.

Hon. Edward Dumbauld, U.S.D.J.

Hon. Edmund Port, U.S.D.J.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

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| UNITED STATES OF AMERICA: | : | |
| V. | : | CRIMINAL NO. H-77-72 |
| ROBERT KELLY and GEORGE N. HUFAULT | : | |

INDICTMENT

The Grand Jury charges:

COUNT ONE

That from on or about the 28th day of December, 1976, to on or about the 26th day of August, 1977, in the District of Connecticut, ROBERT KELLY and GEORGE N. HUFAULT, defendants herein, wilfully and knowingly did combine, conspire, confederate and agree with Gerald Lee Pierce (who is named as a co-conspirator, but not as a co-defendant herein), and with other persons to the Grand Jury unknown, to commit the following offenses against the United States:



1. To unlawfully have in their possession mail matter stolen from the mails well knowing said mail matter was stolen, in violation of Title 18, United States Code, Section 1708; and

2. To utter and publish as true falsely made and forged counterfeit writings with intent to defraud the United States, well knowing said writings to be falsely made and forged, in violation of Title 18, United States Code, Section 495.

OVERT ACTS

In furtherance of said conspiracy, and to effect the objects thereof, the following overt acts were performed:

1. On or about January 3, 1977, GEORGE N. HUFAULT came into possession of a check drawn on the United States Treasury, payable to Esther Berman in the amount of One Hundred Ninety-Nine and 80/100 (199.80) Dollars.

2. On or about the 6th day of January, 1977, ROBERT KELLY cashed a check drawn on the United States Treasury, payable to Esther Berman in the amount of One Hundred Ninety-Nine and 80/100 (199.80) Dollars.

3. On or about February 1, 1977, Gerald Pierce came into possession of a check drawn on the United States Treasury, payable to Mrs. Alice M. Jennings, in the amount of Three Hundred Seventy-Five (375) Dollars.

All in violation of Title 18, United States Code Section 371.

COUNT TWO

That on or about the 3rd day of January 1977 in the District of Connecticut, GEORGE N. HUFAULT, the defendant herein, unlawfully had in his possession a check No. 38,916,050 over a Symbol 3049 drawn on the United States Treasury, payable to the order of Esther Berman



in the amount of One Hundred Ninety-Nine and 80/100 (199.80) Dollars, which had been stolen from the mail, well knowing the said check had been stolen.

In violation of Title 18, United States Code, Section 1708.

COUNT THREE

That on or about the 6th day of January, 1977, in the District of Connecticut, ROBERT KELLY the defendant herein, unlawfully had in his possession a check No. 38,916,050 over Symbol 3049 drawn on the United States Treasury, payable to the order of Esther Berman in the amount of One Hundred Ninety- Nine and 80/100 (199.80) Dollars, which had been stolen from the mail, well knowing the said check had been stolen.

In violation of Title 18, United States Code, Section 1708.

COUNT FOUR

That on or about the 6th day of January, 1977, in the District of Connecticut, ROBERT KELLY, the defendant herein, with intent to defraud the United States, did utter a paper writing in the form of a check No. 38,916,050 over Symbol 3049 drawn on the United States Treasury, with the falsely made and forged endorsement "Esther Berman" on the back thereof, knowing well the said endorsement was falsely made and forged.

In violation of Title 18, United States Code, Section 495.

A TRUE BILL

/s/ Wesley H. Yorgensen
FOREMAN

/s/ Harold James Pickerstein
HAROLD JAMES PICKERSTEIN
CHIEF ASSISTANT UNITED STATES ATTORNEY

/s/ M. Hatcher Norris
M. HATCHER NORRIS
ASSISTANT UNITED STATES ATTORNEY



TRANSCRIPT (Relevant Portions)

EXCERPT FROM DIRECT EXAMINATION OF GERALD LEE PIERCE BY M. HATCHER NORRIS, ESQUIRE, ASSISTANT UNITED STATES ATTORNEY ON JANUARY 4, 1978.

[Tr. 5]

Q. And how are you able to identify that Exhibit No. 1?

A. Well, I recognize the name, and also looking on the back I recognize my handwriting.

Q. And what did you write on the back of Government's Exhibit No. 1?

A. I wrote the signature of the name of the person that appears on the front of the check.

Q. What name is that?

A. Esther Berman.

Q. And do you recall how you first came in possession of Government's Exhibit No. 1?

[Tr. 6]

A. I do.

Q. Can you tell the ladies and gentlemen of the jury how you came into possession of that exhibit?

A. I got it from Mr. Hufault.

Q. Now, when and under what circumstances did you get it from Mr. Hufault?

A. Well, it would have been approximately either January 3rd or January 4th, on or about.

[Tr. 7] **********

Q. And what did you do with the Esther Berman check, Government's Exhibit No. 1?

A. I brought it to some friends of mine.

Q. And who were those friends?

A. Peter and Marilyn Baker.

Q. And where were they when you brought the check to them?

A. They were at their house on Asylum Avenue.



Q. And what happened with the check then?

A. Well, then we brought the check to Arthur's Drug Store.

**********

Q. And where is Arthur's Drug Store located?

A. On Sigourney and Farmington Avenue in Hartford.

[Tr. 8]

Q. And are you familiar with the name K-C Food Industries?

A. I am.

Q. And what is that?

A. Well, that was a corporation that ran the delicatessen at Arthur's Drug.

**********

Q. What happened when you and Marilyn Baker and Peter Baker arrived at Arthur's Drug Store?

A. Well, we went to -- we all went to a booth

together. Then Peter went up and he spoke to Mr. -- Peter Baker went up and spoke to Mr. Kelly, who was at another section of the delicatessen, and came back to where we were seated, and then Peter and Marilyn went to the rear of the delicatessen with Mr. Kelly.

Q. And did you see what happened at the rear of the delicatessen?

[Tr. 9]

A. No.

Q. Who had the check at this time, the Esther Berman check?

A. Marilyn Baker.

Q. And what happened when you saw Peter and Marilyn Baker again?

A. Well, they came back to the booth and gave me my percentage of the check.

Q. What was your percent of the check?

A. Half price.



**********

[Tr. 18]

Q. And what dealings did you have with Robert Kelly?

A. Well, the first time that I had any direct dealings with him would be in February.

Q. I see.

A. Or mid January.

Q. When did you first have a conversation with Robert Kelly about checks?

A. In mid January.

CROSS-EXAMINATION BY ATTORNEY F. MAC BUCKLEY FOR THE DEFENDANT GEORGE HUFAULT ON JANUARY 4, 1978.

[Tr. 101]

A. We brought the check to the delicatessen. By "we" meaning Peter and Marilyn Baker and myself.

Then Marilyn Baker went into the bakc with Mr. Kelly and with Peter Baker, and then they re-

turned, and Peter had the full face value of the check.

Q. All right. So it's your assumption based on that, then, that Mr. Kelly didn't get anything?

A. Yes sir.

Q. And Mr. Hufault got half of your half?

A. I got half of his half, since it was his check.

Q. All right. Now, that's the Berman check.

A. Yes sir.

RE-DIRECT EXAMINATION BY M. HATCHER NORRIS ON JANUARY 4, 1978.

[Tr. 116]

Q. Now, there were some other questioning about the Berman check. Was it your testimony that Mr. Kelly got none of the proceeds of that check?

A. Yes sir.

Q. And--

A. To the best of my knowledge.

[Tr. 118]



A. I'm not so sure I understand what you mean. If I may answer to what I suspect you want, what you mean by your question is why was Mr. Kelly cashing the checks for Baker?

Q. Yes. That's the question. Now, do you have personal knowledge of why?

A. Yes sir.

Q. And where does your knowledge come from?

A. Well, I would accompany the Bakers to K-C Food Products where they would bring ampetamines to Mr. Kelly.

Q. Did there come a time where you, the Bakers and Mr. Kelly would be together?

A. Not prior to January, no. We were -- I mean we would be in the same -- we would be in the delicatessen; but when most of the transaction occurred in regard to the cashing of checks I would wait at the counter while they, the Bakers and Mr. Kelly, went to the rear.